No. 3898

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED,
(a corporation),
Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J. SWEENEY, copartners doing business under the firm name of Larzelere, Sweeney Company,
Defendants in Error.

REPLY OF DEFENDANTS IN ERROR TO ORAL ARGUMENT OF A. J. HARWOOD.

CHARLES W. SLACK and
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Attorneys for Defendants in Error.

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Counsel for plaintiff in error, in his oral argument, not only fails to meet the points raised by defendants' brief, but he makes several statements which are not warranted by the facts or inferrible from our argument or from the cases cited.

On the first page of his argument, counsel states that

> "defendants in error practically concede that the court was in error."

To support this statement, counsel says (Oral Argt., pp. 2-3):

> "'Shipment March 10th' means exactly the same as 'shipment to be effected from Australia on March 10th'. In the contract between the parties they used a few more words to express their meaning—that is all."

This statement is not argument. It is simply a claim that the words "to be effected from" have no meaning or, at least, no importance. The case of *Tobias v. Lissberger,* 105 N. Y. 404, is in point. It was there expected that, although the vessel on which the goods were shipped was ice-bound, the ice would break up in March (105 N. Y. 409), but the ice did not break up until April second or third. In the case at bar, plaintiff says it expected the "Waitotara" to sail from Melbourne direct to San Francisco (Tr., pp. 43-44) on March 10 (p. 45). The "Waitotara", as we have already shown, did not sail until March 16th, and took the indirect route which we have already described. In both cases, the duty to deliver was on the shipper and the carrier was the shipper's agent. In *Tobias v. Lissberger,* the Court said that in providing for *prompt shipment,* the parties contemplated

> "expedition, or immediate and effective, or beneficial shipment as a step towards delivery" (105 N. Y. 412).

So here we say that we contemplated expedition, and so provided for shipment "to be effected from Australia" on the date mentioned, thus using lan-

guage implying a departure as a step towards delivery.

On the hearing, counsel cited a number of cases, not contained in his opening brief, which we had not expected to discuss, because they did not bear on the question before the Court. We stated on the hearing that we believed they did not touch upon the meaning of the word "shipment", and that they had to do simply with the mutual relations between the carrier and the shipper and the determination of the time when such relations commence. An examination of these authorities will show that we were correct in this statement. In every one of them, the point at issue was whether or not, under the circumstances of the particular case, the liability of the ship as a carrier had attached.

In *Scott v. Ira Chaffee,* 2 Fed. 401, the question involved was as to whether the owner of a cargo had a lien on a vessel for the breach of a contract of affreightment, where the cargo had never been laden on board or delivered to the master.

In *Petersburg v. Norfolk etc.,* 172 Fed. 321, the question was as to the liability of the vessel for goods delivered to the dock, receipted for by the agents of the vessel and injured while on lighters prior to loading on board.

In *Bourdoin v. The Harriet Smith,* Betts. Scr. Bk. 25, 4 Fed. Cas. 722, it was merely held that a receipt by the first mate of a vessel for cigars was a good delivery and bound the vessel.

In *The Oregon,* 1 Deady 179, 18 Fed. Cas. 760, delivery to a vessel used as a lighter for the steamship "Oregon" was shown, and it was held that such a delivery bound the latter vessel for the safe carriage of the goods.

In *Campbell v. The Sunlight,* 2 Hughes 9, 4 Fed. Cas. 1187, goods were delivered to a lighter in charge of the vessel and a receipt was given therefor by the master. The vessel was held liable for their loss from the lighter.

In *Guffey v. Alaska Pacific Steamship Co.,* 130 Fed. 271, this Court affirmed a decree dismissing a libel against a vessel, upon the ground that, at the time of the delivery of the goods to the dock for shipment, the vessel was not at the dock and the goods were never received by the master thereof. While counsel states (Oral Argt., p. 7) that, on page 276 of that decision,

> "this Court several times used the expression 'delivered to the ship' and meant thereby a loading of the goods on the ship",

we are unable to find any language of the Court which is susceptible of the construction claimed by counsel. On the other hand, we find a reference on page 276 to a loss of goods

> "before being received on board or coming under the control of the master".

We also find on the same page a statement that

> "there can be no delivery to the ship, in the maritime sense, either of supplies or cargo, so as to bind her in rem, *until the goods are*

> *actually put on the ship or else brought within the immediate presence or control of her officers.''* (Italics ours.)

These statements would seem to indicate that the Court had clearly in mind the distinction between the delivery to the vessel and a loading of the goods on the ship.

In *Pollard v. Vinton,* 105 U. S. 7, the Supreme Court held that a vessel could not be bound by a bill of lading, given by the agents of the owner, for goods which were never delivered to the vessel. The Court there clearly recognized the distinction between shipment and delivery for shipment when it said on page 7 of its opinion that

> *"no cotton was shipped* on the steamboat *or delivered* at its wharf or to its agent *for shipment.''* (Italics ours.)

The passage from the opinion quoted by counsel (Oral Argt., pp. 7-8) again shows the preservation of the distinction between delivery and shipment. The Court was there discussing the time when the contract of carriage commences (105 U. S. 9) and said:

> "Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper and only then could there be goods shipped."

Realizing, perhaps, that the statement in these two sentences might perhaps be construed to limit

the liability of the vessel to cases where the goods were actually shipped, the Court continued as follows:

> "In saying this, we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment the contract of carriage had commenced."

In *Bulkley v. Naumkeag Steam Cotton Co.,* 24 Howard 386, the Supreme Court held a vessel liable for cotton delivered to a lighter and lost prior to being loaded on board. Counsel has quoted a passage from its opinion (Oral Argt., p. 9), which again shows the distinction between delivery and shipment (24 How. 394):

> "We do not see why the lien may not attach when the cargo is delivered to the master *for shipment* before it reaches the hold of the vessel."

The Delaware, 14 Wall. 579, also refers both to loading on board and to delivery to the master, holding the liability of the vessel to attach in either instance.

From these decisions, counsel concludes, by some process of reasoning which, we must confess, we are at a loss to follow, that

> "a vessel's liability as a common carrier never attaches until there has been a shipment."

The rule is, of course, that a vessel's liability never attaches until there has been *either a delivery*

to the master or to the agent of the vessel *or a shipment,* and such is the holding of all of the cases cited by counsel. If delivery to the vessel and shipment were one and the same thing, why should the opinions repeatedly use both terms, in the alternative, and refer both to "loading goods on board" and to "delivery for shipment"?

The case of *Pearce v. The Thomas Newton,* 41 Fed. 106, is the only case cited by counsel which fails to recognize the distinction between the delivery to the master and shipment, and the statement quoted therefrom to the effect that, upon receipt of the goods for shipment, the goods are "shipped", was neither necessary to the decision nor borne out by the citations in support thereof. *Parsons on Maritime Law* was a text published in 1859, which the author afterwards expanded into the work known as *Parsons on Shipping and Admiralty,* and the passage that appears on page 152 of the earlier work, referred to in the decision in *Pearce v. The Thomas Newton,* is identical in language with the passage in the later work appearing on page 183 thereof, and quoted on page 9 of appellant's oral argument. *Conklin on Admiralty,* page 151, also cited in *The Thomas Newton* case, is practically the same in substance as the quotation from *Parsons'* works. In neither case is the meaning of the words "shipped" or "shipment" discussed.

We cannot account for the statement of counsel, appearing on page 14 of his oral argument, to the following effect:

> "Nor does it appear that any English court ever held that a delivery on the dock to the carrier for loading is not a shipment—that is, where the goods are delivered to a carrier for loading on a particular ship which is in port and on which the carrier had agreed to transport the goods."

The case of *J. Aron & Co. v. Comptoir Wegimont,* (1921) 3 K. B. 435, cited by us in our brief, holds exactly what counsel claims no English Court has ever held. The facts in that case are set forth at pages 436 and 437 of the opinion as follows:

> "The sellers were prevented through a strike of longshoremen and others from actually shipping the goods on board the steamship Idaho or any other steamship in October. They had, however, delivered the goods to a dock on October 8, 1919, and they received a receipt which (so far as material) is as follows: 'New York October 8 1919. Cargo received for steamship Idaho on account J. Aron & Co. 772 cases cocoa powder.' Signed 'Frank Williams, receiving clerk.' Frank Williams was apparently the receiving clerk for that vessel."

Upon these facts, the Court said (p. 438):

> "I take in order the questions argued before me. The first was this—namely, whether the goods were 'shipped' in October. Mr. van den Berg, for the sellers, vigorously argued that shipment in October had actually taken place by reason of delivery at the dock to the agents of the ship in the manner I have stated."

And later the Court said (p. 438):

> "In my opinion, those facts do not show shipment in October, 1919, as required by the con-

> tract. *Delivery at docks to the agents of a ship for the purpose of future shipment is not the same thing as an actual shipment on board.*" (Italics ours.)

The case of *Marlborough Hill* (Ship) *v. Cowan & Sons,* (1921) 1 A. C. 444, cited by counsel, has nothing whatsoever to do with the question of when goods are shipped or what constitutes shipment. The point which the Court was discussing in the passage quoted by counsel (Oral Argt., p. 15) was whether or not, under the Bills of Lading Act of 1855 (18-19 Vict., c. 111), the assignee of a document purporting to be a bill of lading, but reciting that goods were *"received for shipment"* instead of *"received on board",* could sue in his own name, and all that the Court held was that, so far as the assignability of such an instrument was concerned, there was no valid reason why such a document should not be deemed to be assignable within the meaning of the act above referred to.

Again counsel's quotations refute his contentions. In the passage quoted, the Court refers to the receipt of goods on the wharf, quay or storehouse "awaiting shipment" as distinguished from an acknowledgment that the goods have been "actually put over the ship's rail", and states that,

> "'*received for shipment*' is the proper phrase for the practical, business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or

> heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage." (Italics ours.)

We are grateful to counsel for the citation of this authority, which bears out our contention that, in all probability, the onions in the case at bar, though *delivered to the ship on May 7th* as Shea testified, were *not shipped until March 12th,* the date of the bill of lading. They were probably waiting "the convenient place and time of stowage".

The remaining portion of counsel's brief is an attempt to excuse the delay in arrival of the goods upon the ground that plaintiff thought the vessel was going to sail direct from Melbourne to San Francisco, and that defendant had no control over the vessel after its departure. Counsel wholly failed to answer, and, indeed, cannot answer, our contention that, the vessel being the agent of the owner for the purpose of the delivery, plaintiff, and not the defendant, was responsible for, and must take the consequences of, any unexplained and unreasonable delay in the delivery of the goods.

The case of *Peace River Phosphate Co. v. Grafflin,* 58 Fed. 550, is readily distinguishable from the case at bar. From the opinion in that case, which involved a demurrer to various pleas set up in defendant's answer, it appeared that the vessels upon which the goods were to be delivered were selected by agreement between both parties. Had we se-

lected the "Waitotara" as the vessel upon which the onions in the case at bar should be shipped to us, the case cited by counsel might possibly be in point.

In *Hardesty v. Pittsburg Steel Co.,* 28 Ky. Law Rep. 367, 89 S. W. 360, the duty of the seller ceased on delivery to the railroad, as there was no obligation on its part to deliver at destination. The case of *Hawes v. Lawrence,* 4 N. Y. 345, also cited by counsel in his opening brief, holds that the time of sailing is not a warranty. The case was decided in 1850, and has been overruled by *Ledon v. Havemeyer,* 121 N. Y. 179.

We respectfully submit that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
March 28, 1923.

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